City of Anaheim
OFFICE OF THE CITY ATTORNEY

September 9, 2008

VIA FACSIMILE (916) 322-6440

Chairman and Members of the
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, California 95814

Re: September 11 Agenda Item No. 9; Prenotice Discussion of Repeal and Readoption of Regulation 18944.1 and Adoption of Regulation 18944.3 – Tickets, Free Admissions and Items Received Through or From an Official's Agency

Honorable Chairman Johnson and Members of the
Fair Political Practices Commission:

Supplementing our prior letter dated July 9, 2008, concerning this subject, the City of Anaheim ("Anaheim"), for all the reasons set forth below, strongly opposes the proposed repeal and readoption of Regulation 18944.1 and the adoption of Regulation 18944.3.

By way of background, which has previously been provided to the Commission, Anaheim is the owner of the Angel Stadium of Anaheim, the Honda Center, The Grove of Anaheim and the Anaheim Convention Center. Anaheim currently has a lease, management agreement or exhibition agreement for each of these public facilities. The terms of each of these agreements provide that Anaheim shall receive a defined number of tickets at specified locations in the facilities, for all events to be exhibited or performed at each of these venues. These tickets are distributed to various public officials and others pursuant to the terms of an officially adopted City policy. The agreements prohibit Anaheim from selling the tickets. In addition, from time to time, Anaheim also receives invitations or admission tickets to various venues in Anaheim for distribution in accordance with the provisions of Regulation 18944.1 in general.

PROPOSED REPEAL AND READOPTION OF REGULATION 18944.1

The proposed regulation is, according to the staff report prepared by counsel for the Commission, an attempt to provide some level of "accountability under the Act" for tickets distributed by an agency to its officials and employees. Anaheim respectfully submits, however, that such "accountability" is neither necessary nor

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appropriate under the Act. As will be demonstrated below, the proposed regulation should not be adopted because it:

1) requires an interpretation of the Political Reform Act ("Act") that is inconsistent with and contrary to the California Constitution.

2) attempts to usurp the authority of an agency's legislative body to determine whether a public purpose is served by a policy that provides an official with a ticket or pass solely based on the official's position with the agency;

3) ignores the right of an agency to provide perquisites to its public officials and employees, in addition to their taxable salary;

4) potentially requires all employee perquisites to be analyzed as gifts under the Act; and

5) is unnecessary in light of the ability of citizens/constituents to hold agencies and officials accountable for misappropriation of public funds.

A. Interpreting the Act to Allow an Agency to be Considered the Source of a Gift is an Unconstitutional Interpretation that Must be Rejected

The proposed regulation is based on the erroneous conclusion that, "an agency could, under the Act, be considered the source of a gift." This conclusion is based on the fact that nowhere in the Act does it provide that an agency *cannot* be the source of a gift. The lack of any such reference is not surprising, however, since Article XVI, Section 6 of the California Constitution prohibits a public entity from making a gift of public funds.

Construing the Act to allow for the making of gifts by a public agency is an unconstitutional interpretation that must be rejected. As the court stated in *City of San Diego v. Rider*, 47 Cal.App.4th 1473, 55 Cal.Rptr. 422 (1996), at page 1490:

> "If a statute is susceptible of two constructions, one that will render it constitutional and one that will either render it unconstitutional or else raise serious constitutional concerns, the court will adopt a constitutional construction [Citation omitted]."

The constitutional prohibition against a public agency making a gift of public funds must be read into the Act in order to render the gift limitation and disclosure provisions constitutional. Put another way, if a public agency cannot legally make a

gift of public funds, the Act must be construed to exempt from its gift limitation and disclosure requirements any transfer of tickets or other property from a public agency to its officials and employees.

The proposed regulation, by requiring a showing that the transfer of tickets by the agency to its officials serves some governmental purpose in order to avoid having such tickets fall within the definition of a "gift" under the Act, is tantamount to legitimizing the giving of a gift by a public agency. This result flies squarely in the face of the constitution and should be rejected.

B. The Proposed Regulation Usurps the Discretion of the Agency's Legislative Body to Determine Whether the Transfer of the Tickets Serves a Public Purpose

Under subdivision (e) of the proposed regulation, in order for tickets received by an official or employee to be exempt from the definition of a "gift," the distribution must be made pursuant to a written policy established by the agency which sets forth the specific governmental or public purpose of the agency to be accomplished by the distribution of the tickets. In other words, without a written policy, the transfer of the tickets is a "gift" by the agency (*i.e.*, it does not serve a public purpose). Additionally, proposed subdivision (e) provides that if the policy authorizes the distribution of tickets to an official based on the official's position with the agency, such policy, "does not satisfy the governmental or public purpose requirement unless the official's written job duties require the official to appear at the event for which the ticket or pass is provided."

With all due respect, this Commission does not have the authority to determine whether a transfer of tickets by the agency to its officials or employees is for a public purpose. In *Paramount Unified School Dist. v. Teachers Assn of paramount*, 26 Cal.App.4th 1371, 1388, 32 Cal.Rptr. 311(1994), the court set forth the test for determining whether an appropriation of property by a public agency is considered a "gift" and role of the legislature in making that determination as follows:

> " 'It is well settled that, in determining whether an appropriation of public funds or property is to be considered a gift, the primary question is whether the funds are to be used for a "public" or a "private" purpose. If they are for a "public purpose," they are not a gift within the meaning of section 31 of article IV. [Now § 6 of art. XVI.] [Citations omitted.] The benefit to the state from an expenditure for a "public purpose" is in the nature of consideration and funds expended are therefore not a gift even though private

> persons are benefited therefrom. [Citation omitted.] [¶] *The determination of what constitutes a public purpose is primarily a matter for legislative discretion [citations omitted], which is not disturbed by the courts so long as it has a reasonable basis.* [Citations omitted.]' " (*Kizziah v. Department of Transportation* (1981) 121 Cal.App.3d 11, 22 [175 Cal.Rptr. 112].) [Emphasis added.]"

Thus, if the legislative body of an agency determines that the transfer of tickets to its officials or employees is for a public purpose, and that determination has a reasonable basis, it will be upheld. This Commission cannot usurp the discretion of the agency's legislative body by declaring, through regulation, that if the policy authorizes the distribution of tickets to an official based on the official's position with the agency, such policy does not constitute a governmental or public purpose unless the official's written job duties require the official to appear at the event for which the ticket is provided. By attempting to regulate the transfer of tickets by an agency to its officials in this manner, the proposed regulation purports to strip agencies of their legally vested discretion to determine whether such transfer serves a public purpose, which is contrary to well-established law.

C. <u>The Proposed Regulation Ignores the Right and Longstanding Practice of a Public Agency to Provide Perquisites to its Public Officials and Employees in Addition to Compensation</u>

Subdivision (h) of the proposed regulation states, in relevant part:

> "[w]hen an agency provides a ticket or pass to an official of that agency as part of the official's government salary for the position, the ticket or pass is not a gift so long as the agency treats the ticket or pass as government salary consistent with applicable state and federal tax laws."[1]

In other words, the agency must either adhere to the regulation's determination of what constitutes a governmental or public purpose or treat the

[1] The regulation also requires that in order for the ticket or pass, which is part of an official's taxable salary, to be exempt from the gift restrictions of the Act, the ticket must be distributed in accordance with subdivisions (e) and (f) requiring specific written policies to be established by the agency and disclosure of ticket distribution on the agency's website. Anaheim is at a loss to understand why a portion of an official's salary (*i.e.*, gratis event tickets) would have to be subject to such policies, when the consideration for his or her salary is services rendered on behalf of the agency.

tickets as part of an official's salary in order to avoid the gift limitations and disclosure requirements of the Act. Notwithstanding the fact that the Commission has no authority to determine whether an agency's transfer of tickets is for a public purpose, this rule ignores the right of an agency to give its officials and employees perquisites in addition to taxable salary.

The Act itself recognizes that a public agency can legally give its officials perquisites. Section 82030(b)(2) provides that, "[i]ncome, also does not include salary... *or other similar benefit payments*, [emphasis added]" received from a local government agency. Similarly, the court in *County of Ventura v. State Bar*, 35 Cal.App.4th 1055, 41 Cal.Rptr. 794 (1995), discussed the issue of whether voluntary perquisites paid to public employees (in that case, a public attorney's state bar dues) were a waste of public funds (*i.e.*, an unlawful gift of public funds) and, thus, subject to a taxpayer's suit under Code of Civil Procedure section 526a. The *County of Ventura* court stated, at page 1059:

> "Many perquisites of employment need not be provided in order for an employee to get the job done, and in that sense their payment by a public agency is voluntary: a public attorney can do the job without being provided medical, dental or vision care insurance, under substandard office conditions, with only a week's vacation each year, being paid an uncompetitive salary. But if an expenditure of public funds were permitted only to the extent essential to getting a day's work out of a licensed attorney, then little more than subsistence wages could be provided, and the obvious result would be inability to attract and keep high quality employees.
>
> "The proper question in reviewing a perquisite of employment for waste of public funds is whether the perquisite is necessary or useful or provides a benefit to the public agency. [Citation omitted.] Normally the answer will be yes. Payment for a non-essential perquisite – such as vision care insurance, a private office, or a decent desk chair – benefits the public agency in that, *as part of an overall employee benefits package* (emphasis in original), it helps attract and keep superior employees. Such expenditures are beneficial, useful, and as a practical matter necessary to the staffing of a high quality office of public attorneys. [Footnote omitted.]"

Although the issue in *County of Ventura* was whether payment of a portion of the bar dues was a waste of public funds, the analysis under Code of Civil Procedure Section 526a and Article XVI Section 6 of the California Constitution is essentially the same, namely, whether the expenditure serves a public purpose.

It is entirely reasonable for an agency to conclude that providing tickets to its officials benefits the agency and, therefore, serves a public purpose, by allowing the agency to recruit and retain employees and attract members of the public to serve in public office. The fact that the tickets are not part of a formal "benefits package" does not make them any less valuable as a recruiting and retention tool. In that sense, the tickets are no less a perquisite of office than the private office or decent desk chair referred to by the court in *County of Ventura* or preferential parking in a public parking lot.

Agencies have a right to offer perquisites to their officials. The proposed regulation ignores that right and should not be adopted.

D. Under the Reasoning of Proposed Regulation 18944.1, Every Perquisite Given to Public Employees Could be Subject to the Gift Limitation and Disclosure Provisions of the Act

It is the position of counsel for the Commission that the exceptions under the current regulation, "completely swallow the rules the Act places on receiving gifts," and that there is no support within the Act that allows an official to avoid receipt of a gift without showing that consideration of equal or greater value was provided in exchange for the personal benefit. If one follows this reasoning to its logical conclusion, every perquisite given by a public agency to an official would require a showing that consideration of equal or greater value was provided in exchange for the personal benefit. Thus, lunch provided at an employee appreciation day could arguably be considered a gift. Would an employee service recognition award be a "gift"? What about a parking permit in a public parking lot? Would employees have to determine the value of coffee in office break rooms? How about the use of a locker and showers for employees who ride bikes to work?

The slippery slope created by the faulty reasoning underlying the proposed regulation is not only dangerous, it could be disastrous to the efficient operation of public agencies. For example, if perquisites are to be classified as "gifts" and a public official were to receive over $390.00 worth of perquisites from his or her own public agency within any 12-month period,[2] the official would be legally prohibited

[2] An amount easily attainable. for example, if an agency provided free parking to their officials in parking lots where a fee is otherwise charged to members of the public.

from participating in any decision which has a material, financial effect on his or her own agency. Such a ludicrous result could not have been intended by the Act. In fact, the Act expressly recognizes the absurdity of such a result with regard to salary and other similar benefit payments received from an official's own agency by excluding such salary and similar benefit payments from the definition of "income" for purposes of the Act (Government Code Section 82030(b)(2)). There was no need to include a similar provision in the definition of "gift" (*see*, Government Code Section 82028) because, consistent with the constitutional limitations discussed above, the Act never contemplated that perquisites and other benefits of employment received by an official from his or her own agency be deemed "gifts" to the official.

Public agencies are given wide discretion to determine what perquisites are necessary and appropriate for their officials, as limited by Article XVI, Section 6 of the Constitution, and such discretion should not be restricted by the proposed regulation.

E. Accountability to the Citizens of the Agency/Constituents of the Public Official is Sufficient to Protect Against Any Improper Expenditure of Public Funds

Proposed Regulation 18944.1 represents an effort to provide some measure of accountability for the distribution of tickets to public officials by their agencies and ensure that the agency derives some public benefit (*i.e.*, consideration) for the tickets. Anaheim submits that this Commission need not give the Act a tortured and unconstitutional interpretation in order to achieve these objectives. The citizens/constituents of the agency/public official are the most powerful form of check and balance against abuses by public agencies and officials. Documents evidencing distribution by an agency to its officials are public records subject to disclosure under the Public Records Act. If citizens/constituents believe that abuses are taking place, the electoral process, as well as the courts of law, offer ample opportunity for redress of any abuses. The proposed regulation is unnecessary and should not be adopted.

PROPOSED REGULATION 18944.3

According to the staff report prepared by counsel for the Commission, this regulation, "simply clarifies that in all situations where a gift of public funds is a misuse of public resources under state law, the Commission will treat the gift, when applicable, as a violation of the gift provisions of the Act." Anaheim interprets this, in light of the language of proposed regulation, to mean that if a public official receives something of value from his or her agency that, presumably, is determined by a court of law to be a gift of public funds under the state constitution, then the item received will be treated as a "gift" under the gift limitation and disclosure requirements of the Act.

Assuming the foregoing interpretation is correct, this proposed regulation, if adopted, could result in a public official being prevented from performing his or her duties on behalf of the agency because of a conflict of interest, as discussed in the preceding Section D of this letter under the discussion relating to proposed Regulation 18944.1. Furthermore, such public official, if an employee, could arguably not be discharged by the agency because it was the agency act in giving the item of value to the employee which gave rise to the conflict. As one might imagine, although the likelihood of such a result could be remote, the results could have significant adverse consequences to the agency, especially if the item of value was given to a large sector of the workforce.

To the extent this regulation is an effort to prohibit an agency from making gifts of public funds, this prohibition is adequately covered by the state constitution and is, therefore, unnecessary.

For all of the foregoing reasons, Anaheim respectfully urges the Commission not to repeal and readopt proposed Regulation 18944.1 and not to adopt proposed Regulation 18944.3. To the extent the Commission believes any modification of current Regulation 18944.1 is needed, Anaheim supports the draft regulation submitted to the Commission under cover of the letter dated August 21, 2008, from Michael D. Martello, City Attorney of the City of Mountain View.

Anaheim will be present at the September 11, 2008, prenotice hearing to address the Commission on this matter.

Respectfully submitted,

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City Attorney

Respectfully submitted,

Cristina L. Talley
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c: Mayor Pringle and Members of the Anaheim City Council
David M. Morgan, City Manager

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